

# Dausab v The Minister of Justice

*Case digest of Dausab v The  
Minister of Justice*

Human  
Dignity  
Trust

*Prepared July 2024*

## CASE DIGEST

### Dausab v The Minister of Justice

The High Court of Namibia, Main Division, Windhoek  
Namibia

Case number HC-MD-CIV-MOT-GEN-2022/00279

<b>Applicant:</b>	Friedel Laurentius Dausab
<b>1st Respondent:</b>	The Minister of Justice
<b>2nd Respondent:</b>	The Minister of Home Affairs, Safety and Security
<b>3rd Respondent:</b>	The Minister of Defence and Veterans Affairs
<b>4th Respondent:</b>	The Prosecutor General
<b>5th Respondent:</b>	The Attorney General

#### Summary

Same-sex intimacy between men was initially criminalised in Namibia under colonial rule. The common law offences of “sodomy” and “unnatural sexual offences” derived originally from the imposition of Roman Dutch law on South Africa, and were inherited from South African law into Namibian law when Namibia became an independent nation in 1990. They were subsequently found to be contrary to the South African Constitution and have not been part of South African law since the ground-breaking judgment in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* in 1998. In Namibia however, the offences made their way into the statutory law via a number of different legislative references. Although only men were criminalised, the whole LGBT community were affected by the stigma and discrimination these laws enable.

In June 2022, Friedel Dausab filed a case before the High Court of Namibia challenging the constitutionality of the common law offences and the statutory provisions which incorporated the crimes of sodomy and unnatural sexual offences. The case was heard in October 2023.

On 21 June 2024, a three-judge bench of the High Court of Namibia ruled that the laws amounted to unfair discrimination and were therefore unconstitutional and invalid. The court held that “*the enforcement of the private moral views of a section of the community (even if they form the majority of that community), which are based to a large extent on nothing more than prejudice*” is not justifiable, and that criminalising gay men “*poses a greater threat to the fabric of society as a whole than tolerance.*”

### **Challenged Provisions**

The Applicant challenged the common law offences of sodomy and unnatural offences.

In addition, the Applicant challenged the following statutory provisions which incorporate the common law offences of sodomy and unnatural sexual offences:

- Schedule 1 of the Criminal Procedure Act 1977 (Act 51 of 1977)
- Section 269 of the Criminal Procedure Act 1977 (Act 51 of 1977)
- Schedule 1 of the Immigration Control Act 1993 (Act 7 of 1993)
- Section 68(4) of the Defence Act 2002 (Act 1 of 2002)
- The inclusion of sodomy and unnatural sexual offences in any other statute

## **Grounds of claim**

The Applicant argued that the common law offences, as well as its incorporation in various statutory provisions are in violation of the following rights contained in the Constitution of Namibia ('the Constitution'):

- Right to equality and freedom from discrimination – Article 10
- Right to dignity – Article 8
- Right to privacy – Article 13(1)
- Right to freedom of association – Article 21(e)
- Right to freedom of expression – Article 21(a)

The sixth ground of claim was that the challenged offences were vague and therefore violated the constitutional principle of legality and the rule of law.

## **Remedies sought**

The Applicant sought an order from the High Court declaring that the common law offences of sodomy and unnatural sexual offences, as well as the statutory provisions that incorporates these offences, are unconstitutional and invalid.

## **Orders granted**

The High Court declared that the common law offences of sodomy and unnatural sexual offences are unconstitutional and invalid, as these laws amount to unfair discrimination. The High Court also declared that the inclusion of the crime of sodomy in the Criminal Procedure Act 1977, Immigration Control Act 1993 and Defence Act 2002 is unconstitutional and invalid.

## Written decision

The three-judge bench of the High Court of Namibia declared that the impugned laws are unconstitutional and invalid, on the basis that they amount to unfair discrimination under Article 10 of the Constitution. Article 10(1) provides that all persons shall be equal before the law, and Article 10(2) provides that no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

The High Court began by considering whether the impugned laws differentiate between people or categories of people. The court held that the sexual conduct that is criminalised between two men, whether committed with or without consent and in public or in private, is not regarded as criminal if committed by a male with a female (paragraph 18). Further, consensual sexual acts of the kind criminalised under the sodomy and unnatural sexual offences provisions between women do not constitute an offence, and so the only distinction that makes such acts criminal is the participants' gender or sex (paragraph 19).

Having found that the impugned laws create a differentiation between people or categories of people, the High Court considered whether this differentiation is based on a rational connection to a legitimate purpose, to determine whether there is discrimination under Article 10(1) of the Constitution. The court noted:

*“What threat does a gay man pose to society, and who must be protected against him? We are of the firm view that the enforcement of the private moral views of a section of the community (even if they form the majority of that community), which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose.”* (paragraph 28).

It went on to conclude that in a democratic society, with a Constitution “*which promises the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family...*” it is not reasonably justifiable to make an activity criminal “*just because a segment, maybe even a majority of the citizenry consider it to be*

*unacceptable*” (paragraph 30).

Further, the High Court found that there is nothing rational about criminalising the sexual conduct which constitutes an offence if committed between two men, but not criminalising the same sexual activity between a male with a female or between two women (paragraph 31). The court rejected the Respondents’ argument that criminalising anal sex between two men and not between a man and woman amounts to differentiation but not discrimination (paragraph 33). It concluded that it is not reasonably justifiable to criminalise consensual anal sex in private between men, and that “*the law of consensual sodomy is arbitrary and unfair and is based on irrational considerations*” (paragraph 37).

The High Court also held that the criminalisation of anal sex between consenting adult males in private is outweighed by the harmful and prejudicial impact the impugned laws have on gay men, finding that:

*“[D]epriving gay men of the right to choose for themselves on how to conduct their intimate relationships, poses a greater threat to the fabric of society as a whole than tolerance and understanding of non-conformity could ever do.”* (paragraph 42).

The High Court then considered whether the differentiation created by the impugned laws amounts to discrimination under Article 10(2) of the Constitution. The High Court rejected the Respondents’ argument that discrimination is proscribed only if it is based on grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status under Article 10(2) of the Constitution. It held that whilst the differentiation between gay men and heterosexual men was not based on one of the enumerated grounds set out in Article 10(2), the differentiation still amounts to discrimination which is unconstitutional. The court held that “*the fact that a ground is not listed in Article 10(2) is not a licence for the law to discriminate on that ground*” (paragraph 44).

The court emphasised the special place that equality has in the Namibian Constitution, for instance in the preamble (paragraph 47). It cited with approval the decision in *Müller v President of the Republic of Namibia and another* [1999] NR 190 (SC) which concluded that discrimination in the context of the Namibian Constitution means an element of unjust or unfair treatment (paragraph 56). The High Court concluded that the differentiation created by the impugned laws on the basis of sexual orientation amounts to unfair discrimination and is thus unconstitutional (paragraph 57).